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No. 90-1676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether section 18 of the Occupational Safety and Health Act precludes Illinois from promoting public safety and environmental protection through the use of its traditional police power to license occupations merely because its licensing requirements also serve OSHA's purpose of worker safety?

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The January 29, 1991 order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's petition for rehearing is not published, but is reprinted in the appendix to the petition for writ of certiorari. (Pet. App. 1).

The November 14, 1990 opinion of the United States Court of Appeals for the Seventh Circuit is reported *sub nom. National Solid Wastes Management Association v. Killian*, 918 F.2d 671 (7th Cir. 1990), and reprinted in the appendix to the petition for writ of certiorari. (Pet. App. 3).

The August 30, 1989 order of the United States District Court for the Northern District of Illinois, Eastern Division, granting NSWMA's motion to clarify and amend the judgment of the district court is not reported but is reprinted in the appendix to the petition for writ of certiorari. (Pet. App. 44).

The August 14, 1990 memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported but is reprinted in the appendix to the petition for writ of certiorari. (Pet. App. 46).

JURISDICTION

The Court of Appeals for the Seventh Circuit entered its judgment on November 14, 1990. On January 29, 1991, the court denied the Illinois Environmental Protection Agency's petition for rehearing and suggestion for rehearing *en banc*. The Agency's Petition for a Writ of Certiorari was filed within 90 days of that date on April 29, 1991. On December 16, 1991, this Court granted the Petition. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2. (Pet. App. 63).

The Occupational Safety and Health Act, 29 U.S.C. §§651, 652(8), 653(b)(4), 654, 655, 655 note, 667, 672. Appendix to Petitioner's Brief ("Br. App." 1).

The Superfund Amendments and Reauthorization Act of 1986, 29 U.S.C. §655 note (1988) (Br. App. 7).

The Occupational Safety and Health Administration Final Rule on Hazardous Waste Operations and Emergency Response. 29 C.F.R. §§1910.120(a) and 1910.120(e) (1991). (Pet. App. 66).

The Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7701-7717. (Pet. App. 73).

The Illinois Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7801-7815. (Pet. App. 87).

STATEMENT OF THE CASE

The Parties

The Petitioner, Mary Gade,[1] is the Director of the Illinois Environmental Protection Agency (hereinafter "IEPA"). She is charged with the administration and enforcement of the Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act and the Illinois Hazardous Waste Laborers Licensing Act (hereinafter "Illinois licensing acts"). Ill. Rev. Stat. 1989, ch. 111, pars. 7701-7717 and Ill. Rev. Stat. 1989, ch. 111, pars. 7801-7815. (Pet. App. 73). The Respondent, National Solid Wastes Management Association, (hereinafter "NSWMA"), is a national trade association of business entities whose principal business is removing, transporting, disposing, and handling of waste material, including hazardous waste. (R. Doc. 1, p. 2).

[1] Mary Gade succeeded former IEPA Director Bernard Killian. She is automatically substituted as a party pursuant to Sup. Ct. R. 35.3. Neil F. Hartigan, former Illinois Attorney General, whose name appears in the caption of the published Court of Appeals opinion, was dismissed as a party-defendant by order of the district court entered on February 8, 1989, and is therefore not a Petitioner herein. (R. Doc. 28).

The Challenged Illinois Licensing Acts

In order for a person to qualify for a license under the Illinois licensing acts, that person must: a) be eighteen years of age; b) not have violated provisions of that act for which disciplinary action could be taken; c) submit a certified record of 40 hours or more of training to work with hazardous waste in a training program which has been approved by either the Illinois Environmental Protection Agency or the U.S. Environmental Protection Agency; and d) pass a written examination authorized by the Illinois Environmental Protection Agency. (Pet. App. 76-77, 89-90). Illinois' licensing act for hazardous waste crane operators contains the additional requirement that the person submit a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours. (Pet. App. 77).

The OSH Act

The Occupational Safety and Health Act of 1970, (hereinafter "the OSH Act"), 29 U.S.C. §651 *et seq.* (1988), delegates authority to the Secretary of Labor to promulgate federal occupational safety and health standards. 29 U.S.C. §655. The Secretary of Labor (hereinafter "Secretary"), is also charged with enforcing the federal standards. 29 U.S.C. §659. The Secretary has delegated certain statutory responsibilities to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration. 48 Fed. Reg. 35736 (Aug. 5, 1983).

A state may assume responsibility for development and enforcement of its own occupational safety and health standards in place of federal standards if it submits a state

plan which meets with the Secretary's approval. 29 U.S.C. §667(b) and (c). A state plan will be approved by the Secretary if, among other things, it "will be at least as effective in providing safe and healthful employment and places of employment" as the federal standards. 29 U.S.C. §667(c)(2).

About half the states have OSHA approved state plans. 54 Fed. Reg. 9314 (1989). Illinois does not. State standards are promulgated and enforced by state occupational safety and health agencies in state plan states. In those states that do not have a state plan, OSHA enforces the federal OSHA standards. To encourage states to adopt state plans, Congress authorized the Secretary to make grants to the states of up to 90 per cent of the cost of developing a state occupational safety and health plan and up to 50 per cent of the cost to the state of operating the plan. 29 U.S.C. §672.

The OSHA Hazardous Waste Standard

While the OSH Act delegated to the Secretary the authority to determine what federal occupational safety and health standards would be promulgated, (29 U.S.C. §655(b)), Congress took the initiative in the case of the OSHA standard governing safety and health protection for hazardous waste workers. Congress explicitly directed the Secretary of Labor to promulgate this standard in Section 126(a) of the Superfund Amendments and Reauthorization Act of 1986 (SARA). P.L. 99-499, §126, 100 Stat. 1690 (1986) (codified at 29 U.S.C. §655 note). SARA was enacted to extend and amend the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.* Section 126 of SARA directs the Secretary of Labor pursuant to section 6 of the Occupational Safety and Health Act of 1970 to "promulgate stan-

dards for the health and safety protection of employees engaged in hazardous waste operations." 29 U.S.C. §655 note. Congress directed the Secretary of Labor to provide "worker protection provisions" in eleven different categories including specific training requirements. 29 U.S.C. §655 note (b) and (d). Congress mandated a minimum offsite training requirement of 40 hours for general site workers and a minimum of eight additional hours of training for supervisors. 29 U.S.C. §655 note (d)(1) and (2).

The interim OSHA hazardous waste standard was promulgated on December 19, 1986. The interim standard was superseded by the final Occupational Safety and Health Administration Standard on Hazardous Waste Operations and Emergency Response (hereinafter "hazardous waste standard") which was promulgated on March 6, 1989, effective one year after its promulgation. 54 Fed. Reg. 9294 (March 6, 1989). It is codified at 29 C.F.R. §1910.120 (1991). This OSHA standard requires that each employer certify that all hazardous waste general site workers have received a "minimum" of forty hours of training, or its equivalent in experience, and that their supervisors have "at least" eight additional hours of specialized training. 29 C.F.R. §1910.120(e) (1991).

The Complaint

NSWMA filed a complaint in the U.S. District Court for the Northern District of Illinois alleging that the Illinois licensing acts were preempted by the OSHA hazardous waste standard, 29 C.F.R. §1910.120 (1991). NSWMA's claim was grounded on the fact that the hazardous waste standard includes training requirements, and the Illinois licensing acts require training as a qualification for a license. (R. Doc. 1, p. 10). NSWMA also claimed that the

Illinois licensing acts violated the Commerce Clause. (R. Doc. 1, p. 12).

The IEPA asserted that the Illinois licensing acts were not preempted because they served the state's interests of promoting public safety and protecting the environment, both of which are beyond the scope of OSHA regulation. (R. Docs. 21, 25). The IEPA also asserted that the Commerce Clause challenge was premature. (*Id.*)

The District Court Proceedings

The district court heard evidence from expert witnesses for NSWMA and the IEPA for two days. The expert witnesses for NSWMA acknowledged that work on hazardous waste sites presents a wide variety of hazards to the surrounding community, the environment, and the workers. (R. Doc. 73-1, pp. 32, 81-84). NSWMA experts also testified that their companies provided extensive training for their employees which met with the requirements of the OSHA hazardous waste standard. (*Id.* at pp. 12-14, 61-64.). They admitted, however, that they did not know whether all the other companies doing hazardous waste work in Illinois trained their employees as extensively. (*Id.* at pp. 52, 88).

The IEPA's expert witness, an eighteen-year veteran crane operator and hazardous materials training instructor, explained how incompetent workers on the hazardous wastes sites threaten the public safety. (R. Doc. 73-2, pp. 141-59). He testified that: (1) failure to decontaminate workers and their equipment brings the hazardous wastes into contact with the public (*id.* at pp. 147-48); (2) failure to properly seal and pack hazardous wastes results in spilling intransit (*id.* at pp. 149-50, 156); (3) rainwater run-off carries toxins offsite (*id.* at pp. 144-45); and (4) an explo-

sion or fire could result from mishandling of dangerous wastes thereby producing noxious fumes (*id.* at pp. 143-44).

The district court held that the Illinois licensing acts were not preempted by the OSHA hazardous waste standard, with one exception which is not at issue herein.[2] Specifically, the court concluded that the state regulation was not preempted by OSHA regulations "to the extent there exists a legitimate and substantial purpose apart from promoting job safety." (Pet. App. 54). The district court also held that NSWMA's Commerce Clause challenge to the 4,000 hour requirement in the Crane Operator's Licensing Act was premature. (Pet. App. 62). NSWMA appealed the district court's decision to the Seventh Circuit Court of Appeals. (R. Doc. 68).

The Seventh Circuit Court of Appeals Decision

A divided panel of the Seventh Circuit Court of Appeals reversed the decision of the district court. (Pet. App. 4). While the majority did not find an intent to preempt state law in the OSHA hazardous waste standard (Pet. App. 13-14), it found an expressed intent to preempt state law in Section 18(b) of the OSH Act, 29 U.S.C. §667(b). (Pet. App. 14, 17). The majority reasoned that by providing the states with the state plan option whereby a state could promulgate standards more protective of worker safety than OSHA standards, Congress intended to preclude the states from adding to OSHA regulation in any other way. Because Illinois did not have a state plan and since there was "no way to separate the worker health and safety

[2] The district court struck the words "within Illinois" from the training requirements of the Illinois licensing acts. (Pet. App. 58). The IEPA did not appeal this decision.

aspect of the [Illinois] requirement from the public health and safety aspect," the Seventh Circuit struck the Illinois requirement. (Pet. App. 32).

Judge Easterbrook, *dubitante*, did not agree with the majority's premise that section 18 of the OSH Act, 29 U.S.C. §667, expressly preempts states from adding to OSHA regulation. Judge Easterbrook concluded that neither a rule of statutory construction, nor the decisions of the other three circuits that have ruled on this issue, nor the legislative history of the OSH Act answered the question whether section 18 precludes a state from adding to OSHA regulation.

This Court granted certiorari to consider the question whether section 18 of the OSH Act precludes Illinois from promoting public safety and environmental protection through occupational licensure merely because its licensing requirements also promote worker safety.

SUMMARY OF THE ARGUMENT

While Congress, in section 18(b) of the OSH Act, gave states the option to preempt federal occupational safety and health standards pursuant to an OSHA approved state plan, it did not say that workers covered under the OSH Act may not be subjected to any supplemental state regulations. Yet, that was the conclusion of the Seventh Circuit in this case. The Seventh Circuit read section 18 as expressly preempting the states from adding their own general safety requirements to the occupational safety requirements of OSHA. The Seventh Circuit's finding of "express" preemption, despite the absence of any explicit preemptive language in the OSH Act, is contrary to the clear and long standing authority of this Court. Furthermore, the Seventh Circuit ignored this Court's repeated admonition that overlapping federal and state regulation

should be permitted to coexist, particularly when the matter being regulated relates to health and safety. *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716 (1985).

It would be incongruous for Congress on the one hand to promote occupational safety through the OSH Act and on the other to prevent states from undertaking supplementary efforts towards this very same end. The OSH Act should not be interpreted to negate its own stated purpose. Congress' invitation in section 18 of the OSH Act, encouraging the states to become more active in promoting worker safety, undermines any inference that Congress intended to impliedly preempt states from also regulating worker safety.

Not only is there no expressed or implied intent to preempt supplemental state safety regulation in the OSH Act, there is no such intent in the OSHA hazardous waste standard. Unlike the OSHA Hazard Communications Standard which explicitly states that it is intended to preempt any state requirements pertaining to the subject, the hazardous waste standard does not contain any preemptive language. Furthermore, the hazardous waste standard specifies only "minimum" training requirements. The plain language of the hazardous waste standard reflects OSHA's intent to permit supplemental state safety regulations.

Even if this Court were to conclude that, by enacting section 18, Congress intended to preempt supplemental state occupational safety regulation, this preemptive effect should not be extended to invalidate state law regulating public safety concerns in addition to occupational safety. Congress in the OSH Act did not intend to address public safety and environmental protection concerns. Nor did Congress require states to obtain OSHA approval of their

public safety and environmental protection legislation whenever that legislation also promoted worker safety. It would pervert Congress' purpose to convert OSHA's shield of worker protection into a sword striking down state public safety and environmental protection legislation.

The Illinois licensing acts which are challenged in this case were enacted in response to the threat that hazardous waste operations pose to the environment and public safety. In promulgating these licensing acts, Illinois exercised its historic police power to regulate entry into occupations as a means of ensuring that the public will not suffer from improper hazardous waste removal. Necessarily, this regulation for public safety and the environment also touches upon the field of worker safety, but does so without conflicting with OSHA requirements. Indeed, Illinois' licensing requirements further Congress' goal of promoting occupational safety.

Given the presumption that the historic police powers of the state to regulate matters of health and safety are not to be superseded by federal regulation unless that was the clear and manifest purpose of Congress, Illinois' licensing acts and OSHA's hazardous waste standard should be permitted to coexist in the spirit of cooperative federalism.

ARGUMENT

I.

FEDERAL LAW PREEMPTS STATE LAW IF THAT WAS THE INTENT OF CONGRESS.

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution" are invalid. *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, ___ S.Ct. ___, 115 L.Ed.2d 532, 542 (1991), *citing*, *Gibbons v. Ogden*, 9 U.S. (1 Wheat.), 211, 6 L.Ed. 23 (1824). Whether Congress has exercised this power in any specific case is fundamentally a question of congressional intent. *English v. General Electric. Co.*, ___ U.S. ___, 110 S.Ct. 2270, 2275 (1990).

A. Congress' Intent To Preempt May Be Expressed Or Implied.

Congress' intent may be expressed or implied. Congress may define explicitly the extent to which its enactments preempt state law. *English*, 110 S.Ct. at 2275. "Absent explicit preemptive language, Congress' intent to supersede state law in a given area may be implicit if a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Mortier*, 115 L.Ed.2d at 542-43 (1991), *citing*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). A state law is also impliedly preempted to the extent that it actually conflicts with federal law. An actual conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

B. State Public Safety Laws Are Presumed Not To Be Preempted.

Anyone seeking to invalidate state public safety legislation must "overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716 (1985). This is true because:

> the 'police power' of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with national law which has the right of way under the Supremacy Clause of Article VI.

Kesler v. Dept. of Public Safety, 369 U.S. 153, 172 (1962). Therefore this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice, supra*, 331 U.S. at 230. "This assumption provides assurance that 'the federal-state balance,' *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Moreover, environmental regulation has long been recognized as a historic police power of the states. *Huron-Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).

II.

SECTION 18 OF THE OSH ACT DOES NOT EXPRESSLY PREEMPT STATE LAW.

The Seventh Circuit's majority opinion construed section 18 of the OSH Act, 29 U.S.C. §667, to "unquestionably preempt" and "expressly prohibit" states from adding to OSHA worker safety regulations despite the fact that there is no explicit preemptive language in section 18. (Pet. App. 14, 17). Section 18 of the OSH Act provides:

> **(a) Assertion of State standards in absence of applicable federal standards.**
>
> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
>
> **(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.**
>
> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. §667(a) and (b).

Section 18 contains no express or specific language which preempts state law. Section 18(a) expressly provides that states are not preempted from regulating worker safety issues with respect to which no federal standard is in effect. 29 U.S.C. §667(a). Section 18(b) expressly authorizes the states, by developing an acceptable state plan,

to preempt federal standards. However, the anti-preemption clause of Section 18(a) and the express authorization to preempt federal law of Section 18(b) are not clear expressions of congressional intent to preempt supplemental state law, and do not support the Seventh Circuit's finding of "express preemption" in this case.

This Court's authority consistently provides that express preemption exists only if that is the clear and manifest purpose of Congress and there is explicit preemptive language in the federal enactment.[3] *English v. General Electric Co.*, ____ U.S. ____, 110 S. Ct. 2270, 2275 (1990). *See also California v. ARC America Corp.*, 490 U.S. 93 (1989); *Pacific Gas and Electric Co. v. State Energy Resources Comm'n.*, 461 U.S. 190 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). "[P]re-emption, if it is intended, must be explicitly stated." *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 504 (1988).

The only mention of the word "preempt" in section 18 of the OSH Act appears in the heading of section 18(b) which permits "State standards to preempt applicable Federal standards." 29 U.S.C. §667(b). The plain language of this provision reflects Congress' intent to permit states

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[3] Where Congress intends to expressly preempt state law, it specifically states so in the federal act. See, e.g., Employee Retirement Income Security Act, 29 U.S.C. §1144(a), ("Supersedure . . . the provisions of this title . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . ."); Emergency Petroleum Allocation Act, 15 U.S.C. §751, ("The regulation . . . shall preempt any provision . . . by any state . . ."). Federal agencies have also explicitly stated Congress' intent to preempt in their regulations. See, e.g., Hazard Communication Standard, 19 C.F.R. §1910.1200(a)(2) (1991), ("This occupational safety and health standard is intended to address comprehensively . . . and to preempt any legal requirements of a state . . . pertaining to this subject.").

to preempt federal occupational safety standards pursuant to OSHA authorized state plans. This specific grant of authority does *not* clearly reflect an intent to prohibit states which do not have OSHA authorized state plans from enacting occupational safety legislation which supplements OSHA standards.

In the recent case of *Wisconsin Public Intervenor v. Mortier*, ___ U.S. ___, ___ S.Ct. ___, 115 L.Ed.2d 532 (1991), this Court found that language in the Federal Insecticide, Fungicide, and Rodenticide Act, ("FIFRA"), 7 U.S.C. §136, which expressly permitted state regulation under certain conditions did not expressly preclude all other regulation. 115 L.Ed.2d at 540. FIFRA permitted states to regulate the sale and use of pesticides but did not expressly authorize regulation by local governments. *Id.*

This Court declared that the statutory language of FIFRA was "wholly inadequate to convey an express preemptive intent on its own." *Id.* at 544. FIFRA did not preempt local regulation simply because the Act did not expressly authorize regulation by local governments. *Id.* As this Court explained: "Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Id., citing Rice, supra*, 331 U.S. at 230.

In the case at bar, as in *Mortier*, Congress' express grant of authority for certain state regulation is not sufficient to expressly preclude all other regulation. Congress' silence regarding supplemental state legislation in the OSH Act cannot suffice to establish a "clear and manifest purpose" to preempt such legislation. The Seventh Circuit's rationale that section 18 of the OSH Act expressly preempts all that it does not expressly save was rejected in *Mortier*. This Court has never applied the maxim

expressio unius est exclusio alterius to find express preemption.

This Court concluded in *Mortier* that FIFRA left ample room for local governments to supplement state and federal efforts even absent express regulatory authorization in the Act. *Mortier*, 115 L.Ed.2d at 548. Likewise, the OSH Act leaves ample room for state regulations to supplement federal efforts even absent express authorization to do so in the Act.

The state plan approach offers the states a large degree of flexibility to modify federal standards so as to accommodate local needs and conditions, as long as the state plan is at least as effective at promoting worker safety as the federal regulations. Congress hoped that this would encourage the states to opt for development of state plans.

Congress sought to further encourage states to develop state plans by authorizing the Secretary to make grants to the states for up to 90 per cent of the cost of developing state plans and for up to 50 per cent of the cost of implementing state plans once approved. 29 U.S.C. §672. These provisions reflect Congress' hope that a majority of states would choose to proceed pursuant to a state plan. They do not, however, reflect any intent on the part of Congress to punish states, or more accurately, the people of the states, that do not submit a state plan. Indeed, the overriding purpose of Congress to promote worker safety would be undermined if the OSH Act is interpreted to strike down state public safety legislation which also promotes worker safety merely because the state did not choose the state plan route.

III.

SECTION 18 OF THE OSH ACT DOES NOT IMPLIEDLY PREEMPT SUPPLEMENTAL STATE LAW.

A. The OSH Act Establishes Minimum Safety And Health Requirements.

The OSH Act is not "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Mortier*, 115 L.Ed.2d at 543, *citing Rice*, 331 U.S. at 230. Indeed, Congress encouraged the states to assume responsibility for administering and enforcing their own occupational safety and health laws pursuant to a state plan. 29 U.S.C. §667(b).

The state plan must provide for development and enforcement of safety and health standards which are "at least as effective in providing safe and healthful employment and places of employment" as the federal standards. 29 U.S.C. §667(c)(2). This language evidences Congress' intent that federal standards serve as minimum standards which may be supplanted by superior state standards.

The Third, Second and First Circuit Courts of Appeals have considered the issue of whether the OSH Act preempts state law and agreed that the OSH Act establishes only minimum requirements. The Third Circuit, in determining the scope of the OSHA hazard communication standard, found a ". . . congressional intention that the OSH Act provide a federal floor for safety in the workplace." *United Steelworkers of America v. Auchter*, 763 F.2d 728, 734 (3rd Cir. 1985); *accord, People of the State of Illinois v. Chicago Magnet Wire Corp.*, 129 Ill.2d 356, 543 N.E.2d 962 (1989).

The Second Circuit, in considering whether New York City's training and certification program for asbestos workers was preempted by the OSHA revised construc-

tion standard, found that the OSH Act's "purpose was to assure minimum—but not necessarily uniform—occupational health and safety standards." *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 59 (2d Cir. 1988).

The First Circuit, in assessing the validity of Massachusetts' program for training and certifying asbestos workers, held that "the OSH Act was intended to provide for the establishment of minimum, and not necessarily uniform, occupational safety and health standards throughout the country," *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 283 (1st Cir. 1990).

Pursuant to the OSH Act, Congress intended to establish only minimum occupational safety and health requirements. Thus, the requirements of the Act are not so pervasive as to make reasonable the inference that Congress left no room for the states to supplement them. *Mortier*, 115 L.Ed.2d at 542-543 *citing Rice*, 331 U.S. at 230.

B. The Federal Interest Is Not Dominant In The Field Of Safety And Health.

While it is true that occupational health and safety issues are of national concern, the federal interest in this field is not so dominant as to preclude enforcement of state health and safety laws. As this Court explained: "every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). In fact, this Court has long held that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Id., citing Rice*, 331 U.S. at 230.

There is nothing in the OSH Act which indicates that Congress intended to preclude states from regulating health and safety matters. To the contrary, Congress expressed its desire to involve the states to the fullest extent in this field. 29 U.S.C. §651(b)(11). In fact, Congress offered to the states the option to preempt federal regulation in this field, 29 U.S.C. §667(b), and authorized the Secretary to make grants to the states for this very purpose. 29 U.S.C. §672. Thus, the OSH Act itself undercuts any inference of field preemption.

C. Supplemental State Regulation Furthers The Purpose Of The OSH Act.

Congress expressly declared that the purpose of the OSH Act is:

> (b) . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—
>
> * * *
>
> (11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws . . .

29 U.S.C. §651(b)(11). (Br. App. 1-2).

Supplemental state regulation would further Congress' purpose of assuring safe and healthful working conditions. Furthermore, such state initiative is consistent with Congress' expressed desire to encourage the states to assume responsibility for administration and enforcement of their occupational safety and health laws.

This Court held that regulations under the New York Social Welfare Law were not preempted merely because they supplemented federal requirements by imposing additional eligibility requirements for welfare assistance.

New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973). The Court recognized that the federal concern for reducing welfare dependency was shared by the states. *Id.* at 413. Therefore, the states, in cooperation with the federal government, must be allowed considerable latitude in attempting to reduce welfare dependency. *Id.* Since the state law furthered the purpose of the federal law in reducing welfare dependency, this Court held:

> [i]t would be incongruous for Congress on the one hand to promote work opportunities for AFDC recipients and on the other to prevent States from undertaking supplementary efforts towards this very same end. We cannot interpret federal statutes to negate their own stated purposes.

Id. at 419-20. Likewise, in the case at bar, it would be incongruous for Congress on the one hand to promote occupational safety through the OSH Act and on the other to prevent states from undertaking supplementary efforts towards this very same end. The OSH Act should not be interpreted to negate its own stated purpose.

Similarly, in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), this Court affirmed the validity of state regulation which supplemented federal regulation. The issue in *CTS* was whether the federal Williams Act preempted Indiana's statute regulating takeovers. In that case, the Indiana act imposed a 50-day delay on the consummation of tender offers while the federal law provided a 20-day period. *Id.* at 76. This Court examined the purpose of the federal law and determined that the state's stricter regulation did not frustrate the federal purpose; rather, it furthered the federal policy of investor protection. *Id.* at 82. Because it was entirely possible for entities to comply with both the federal law and state law, the Court held that the state law was not preempted. *Id.* at 79.

In the case at bar, the Illinois licensing acts impose training, testing and experience requirements on certain hazardous waste workers which do not conflict with the federal training requirements. As the purpose of the OSH Act is "to provide safe and healthful working conditions," (29 U.S.C. §651(b)), the Illinois licensing acts clearly further the federal policy underlying OSHA.

IV.

THE LEGISLATIVE HISTORY OF THE OSH ACT REVEALS CONGRESSIONAL INTENT NOT TO PREEMPT STATE LAW.

Congress' intent not to preempt non-conflicting state laws, evident in the text and structure of the OSH Act itself, is also apparent in the Act's legislative history. Representative Dent explained:

> There was a discussion here a moment ago about the jurisdiction of the State's overlapping—or keeping the States that have good safety laws from enforcing them.
>
> No, you do not do that by this legislation. Federal legislation has never yet superseded State legislation when the State law is superior to the provisions of the Federal law.

116 Cong. Rec. 38,385 (November 23, 1970) (Statement of Rep. Dent). Representative Dent expresses the view that states should keep enforcing their safety laws that supplemented the protection offered by the federal regulation.

The legislative history also supports the interpretation that Congress intended to establish only minimum safety requirements through the OSH Act. This intent is reflected in the statement of Representative Gaydos who explained:

> The bill does not envision a complete takeover of the field by the Federal Government. On the contrary, the Federal Government would merely see to it that certain minimum requirements were met and that beyond those the health and safety of most workers would be left to those States.

116 Cong. Rec. 38,387 (November 23, 1970) (Statement of Rep. Gaydos). Congress expected states to supplement the minimum requirements of the OSH Act with their own occupational health and safety laws.

In addition to the individual comments of the legislators, the Senate Committee Report indicates that the federal regulations enacted pursuant to the OSH Act were intended to be minimum requirements. As that report explained, the national consensus standards which would be promulgated by the Secretary immediately upon enactment, ". . . may not be as effective or as up-to-date as is desirable, but they will be useful for immediately providing a nationwide minimum level of health and safety." S.Rep. No. 1282, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5182. It is highly unlikely that Congress intended to preempt state laws with federal standards which it described as out-of-date. This Committee Report reflects Congress' intent not to preempt supplemental state regulation with the federal standards.

The Seventh Circuit Court of Appeals also examined the legislative history of the OSH Act. Based on a misinterpretation of the House Conference Report which reconciled the House and Senate versions of section 18(h) of the OSH Act, the court found express preemption. Specifically, the Court stated:

> The original Senate version of what is now Section 18 would have permitted states, without having to obtain approval of a state plan, to impose during a transitional period stricter requirements than those established by OSHA. But that provision was eliminated from the final draft of the bill.

(Pet. App. 14-15).

The House Conference Report that the court relied upon provides:

> Both versions of the bill allowed agreements between the Secretary and a State whereby the State could continue enforcement of its health and safety standards pending final action on the State plan. The Senate bill limited such agreements to standards which were not in conflict with Federal standards. The Senate bill also provided that a State standard which was more stringent than a Federal standard was not to be regarded as one in conflict with that Federal standard. The Senate receded.

H.Rep. No. 91-1765, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code & Admin. News 5177, 5228, 5238.

The Seventh Circuit concluded that because the final draft eliminated the reference to stricter state standards, Congress intended to preclude stricter state standards. This conclusion is erroneous because the reference to stricter state standards relates to a restriction which limited the Secretary's authority to enter into agreements with the states; it was not a restriction limiting the states' authority. Under the original version, the Secretary could only agree to allow states to enforce stricter standards. Under the final version, she could agree to allow states to enforce state standards that were even less strict.

It is also important to recognize that this provision applied only "until final action is taken by the Secretary

with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier." 29 U.S.C. §667(h). This section has no application beyond December 29, 1972; thus, it is no longer relevant.

The Congressional Record provides support for this interpretation. The discussions of Representative Hathaway, the spokesman for the amendment, and Representative Steiger of Wisconsin explained this point as follows:

> Representative Hathaway: The amendment which was offered in the other body was restricted to standards that are not in conflict with the Federal standard, and it said that a state standard which was stronger than the Federal standard would not be in conflict. But this restricts the field of application beyond that which I believe the Secretary would like to have and would need to have.
>
> If, for example, you had a Federal standard that said workbenches should be 3 feet apart and if there were a State standard that said they should be 2½ feet apart, then under the Senate amendment that was approved and agreed to, the State standard could not be effective, because it would be in conflict. The Secretary may say "We had better have a 2½-foot standard at least until the 3-foot standard is ready to be enforced." That is why I deleted that language from the Senate amendment.
>
> Mr. Steiger of Wisconsin: I appreciate that explanation. I discussed this with the gentleman from Florida, and we both concur that the amendment does make sense, and we would accept it.

116 Cong. Rec. 10,684 (November 24, 1970) (Statements of Reps. Hathaway and Steiger).

Thus, under the prevailing House version the Secretary could agree to allow States to enforce less stringent health

and safety laws pending approval of the state plan. Under the Senate version, the Secretary could not have done so. If a relevant inference about Congress' intent to preempt state law can be drawn from this amendment, the inference can only be that Congress intended to accommodate the states and their laws to the greatest extent possible.

Even if, assuming *arguendo*, the Seventh Circuit's interpretation of the House Amendment is correct, this obscure piece of the legislative history falls far short of establishing preemption. When this Court examined the legislative history of FIFRA in *Mortier*, it refused to infer preemption from Congress' refusal to adopt an amendment that would have expressly authorized local governmental regulation. 115 L.Ed.2d at 546. Legislative history which indicates Congress' refusal to adopt anti-preemption language "falls far short of establishing that pre-emption . . . was the 'clear and manifest purpose of Congress.'" *Mortier*, 115 L.Ed.2d at 546, *citing Rice*, 331 U.S. at 230.

V.

THE OSHA HAZARDOUS WASTE STANDARD DOES NOT PREEMPT STATE LAW.

A. The OSHA Hazardous Waste Standard Does Not Expressly Preempt State Law.

Not only is explicit preemptive language absent from the OSH Act, it is also absent from the text of the OSHA hazardous waste standard. The Seventh Circuit acknowledged this fact in finding that the OSHA hazardous waste standard contained no express declaration of intent to preempt all state and local requirements on the same subject. (Pet. App. 13). Indeed, the Seventh Circuit determined that ". . . OSHA has explicitly attempted to

avoid broad preemptive effect in promulgating the final rule here." (Pet. App. 14).

Where OSHA intended to preempt supplemental state regulation, it has stated so explicitly. For example, the OSHA hazard communication standard expressly provides that it is intended ". . . to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject." 29 C.F.R. §1910.1200(2) (1991). No such explicit preemptive language is found in the OSHA hazardous waste standard.

B. Congress Did Not Express Or Imply An Intent To Preempt State Law When It Mandated The OSHA Hazardous Waste Standard In 1986.

As part of the Superfund Amendments and Reauthorization Act of 1986 (hereinafter "SARA"), Congress expressly directed the Secretary to promulgate an occupational safety and health standard for the protection of workers engaged in hazardous waste operations. P.L. 99-499, Title I, §126, 100 Stat. 1690 (effective Oct. 17, 1986) (codified at 29 U.S.C. §655 note). Section 126 of SARA explicitly directed the Secretary to promulgate worker safety standards for employees engaged in hazardous waste operations pursuant to section 6 of the OSH Act, 29 U.S.C. §655 note.

Congress mandated that a "minimum" of 40 hours of training be provided to general site workers and that supervisors receive "at least" eight additional hours of training. 29 U.S.C. §655, note (d)(1) and (d)(2). Nowhere in SARA did Congress express an intent to preempt nonconflicting state laws. Indeed, the use of the word "minimum" by Congress indicates just the opposite intent. State laws that require training in excess of 40 hours advance

Congress' purpose and do not conflict with this requirement. The OSHA standard will ensure that the covered employees receive at least 40 hours of training.

Congress did not evince any intent to preempt state law in this or any other section of SARA. Elsewhere in SARA, Congress encouraged states in their hazardous waste cleanup efforts through state credits, 42 U.S.C. §9604(c)(5), and cost sharing provisions, 42 U.S.C. §9604(d)(1). It also directly involved states in federal efforts undertaken within their borders. 42 U.S.C. §§9620(f), 9621(f). When Congress directed the Secretary to promulgate the OSHA hazardous waste standard, it did not indicate a desire to preempt nonconflicting state laws.

C. The OSHA Hazardous Waste Standard Itself Does Not Impliedly Preempt State Law.

Although federal regulations may preempt state law, this Court stated in *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707 (1985), that it will rarely infer preemption by federal regulations since federal agencies can be expected to make their intentions clear if they intend for their regulations to be exclusive. This Court explained:

> Given the presumption that state and federal regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety.

Hillsborough, 471 U.S. at 718. The mere fact that the OSHA hazardous waste standard provides for worker training is not a basis to infer that OSHA intended to preclude supplemental state training requirements.

The OSHA hazardous waste standard does not reveal an implicit intent to exclude supplemental state regulation. OSHA only established a minimum requirement: "General site workers . . . shall receive a minimum of 40 hours of instruction. . . ." 29 C.F.R. §1910.120(e)(3) (1991). This choice of words demonstrates OSHA's intent to permit states to supplement the federal regulation.

Furthermore, elsewhere in the text of the hazardous waste standard, OSHA reflected an intent to accommodate state and federal environmental protection legislation to the greatest extent possible. For example, the note to subsection (b) of the hazardous waste standard provides:

> Safety and health programs developed and implemented to meet other Federal, State, or local regulations are considered acceptable in meeting this requirement if they cover or are modified to cover the topics required in this paragraph. An additional or separate safety and health program is not required by this paragraph.

29 C.F.R. §1910.120(b) note. This accommodation of state regulation reflects OSHA's recognition that states have a legitimate interest in the hazardous waste operations within their communities.

VI.

EVEN IF THE OSH ACT IS FOUND TO PREEMPT STATE OCCUPATIONAL SAFETY LAWS, ITS PREEMPTION DOES NOT EXTEND TO STATE LAWS REGULATING PUBLIC SAFETY CONCERNS IN ADDITION TO OCCUPATIONAL SAFETY.

Even if this Court finds that section 18 of the OSH Act preempts state occupational safety laws, this finding should not be extended to preempt state laws regulating public

safety concerns merely because they also regulate occupational safety. Because of Congress' exclusive concern for regulating occupational safety, any preemptive effect that may be attributed to the OSH Act should not extend beyond that field to invalidate state regulation of other concerns. In fact, the Secretary of Labor endorsed the view that an OSHA standard "should not preempt state laws addressing 'general environmental problems originating in the work place, but whose effects are outside it. . .' " *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir. 1985) ("*Hughey I*"), appeal after remand, 868 F.2d 621 (3d Cir. 1989) ("*Hughey II*"), *cert. denied*, 492 U.S. 920 (1989). Indeed, this Court has held that the field of interstate waste management is not preempted by federal law and that the handling of wastes should continue to be primarily the function of state, regional and local agencies pursuant to the Solid Waste Disposal Act, 42 U.S.C. §6901(a)(4). *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 n.4 (1978).

A. Work On Hazardous Waste Sites Poses A Danger To Public Safety And The Environment.

Historically, the safety and health hazards in and around the workplace threatened only the workers themselves. Developments in technology have changed this fundamental fact. The presence of harmful substances in many of the workplaces of today also seriously threatens the public safety because of the effect that these extremely toxic substances have on the general environment. Nowhere is this more evident than in hazardous waste dump sites and clean-up operations.

Hazardous waste workers who fail to properly decontaminate their clothing and equipment bring the toxins

into contact with the public. (R. Doc. 73-2, pp. 147-48). Laborers who fail to properly seal and pack the hazardous waste may cause it to spill in transit. (*Id.*, pp. 149-50, 156). If a hazardous waste site is not properly controlled, rainwater run-off could carry toxins off site. (*Id.*, pp. 144-45). Mishandling of dangerous waste could cause an explosion or fire producing noxious fumes. (*Id.*, pp. 143-44).

Many state and local governments have responded to this growing threat by enacting safety legislation that also promotes worker safety. Illinois has addressed this threat to public safety by exercising its historic police power to regulate entry into occupations. Specifically, Illinois has enacted legislation requiring hazardous waste crane operators and hazardous waste laborers to become licensed.

B. Occupational Licensure Is A Historic Police Power Of The States.

This Court has long held that the states have power to license occupations. "[I]t has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely." *Dent v. West Virginia*, 129 U.S. 114, 122 (1899). Moreover, this Court has affirmed that states have authority to regulate who may engage in a particular occupation. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (holding that the Kansas legislature was free to decide who could be a debt adjuster). The Illinois licensing acts appear side by side with Illinois' other laws licensing accountants, architects, barbers, commission merchants, dentists, grain dealers, livestock dealers, nurses, physicians, plumbers, and a host of other professional, technical and safety trades and occupations in the Illinois Revised Statutes. Ill. Rev. Stat. 1989, ch. 111, pars. 101-7815.

The purpose of licensing hazardous waste crane operators and laborers is to ensure competence in work involving hazardous waste removal. Any crane operator or laborer involved in hazardous waste work without a valid license "is declared to be inimical to the public welfare and to constitute a public nuisance." Ill. Rev. Stat. 1989, ch. 111, pars. 7714, 7813. (Pet. App. 84, 97). Not only does an unqualified hazardous waste crane operator or laborer endanger his own health, but he also poses a risk to the environment and to members of the community who may suffer from his incompetent handling and removal of hazardous waste. The Illinois licensing acts are acts "in relation to environmental protection," whose purpose is "to promote job safety and to protect life, limb and property." Ill. Rev. Stat. 1989, ch. 111, pars. 7702, 7802. (Pet. App. 73, 87). The Illinois legislature's decision to impose licensing requirements on the hazardous waste crane operators and laborers is consistent with the teachings of this Court in *Dent* and *Ferguson*.

C. The Requirements Of Illinois' Licensing Acts Do Not Conflict With The OSHA Standard.

The training requirements of both Illinois licensing acts, including the 4,000 hour experience requirement of the Illinois crane operators licensing act supplement the worker safety provisions of the hazardous waste standard. These Illinois requirements do not conflict with those of the hazardous waste standard. Indeed, Illinois' requirements further OSHA's purpose of promoting worker safety.

Illinois' licensing acts do not come into conflict with the hazardous waste standard because they do not regulate working conditions and work practices. Instead, the Illinois acts regulate only who may do the work. An "occupational safety and health standard" as defined by the

OSH Act means: "a standard which requires conditions or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §652(8). Illinois' licensing acts fall outside this definition of an occupational safety and health standard. Licensing acts do not address the conditions of the work place or the way the work must be done.

Actual conflict between a federal regulation and state law may exist where compliance with both laws is a physical impossibility. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). However, compliance with the Illinois licensing acts and the OSHA standard is possible. Indeed, Illinois licensed crane operators and laborers would be more capable of complying with the requirements of the OSHA hazardous waste standard than their unlicensed counterparts.

D. The Other Circuits Have Limited OSHA Preemption.

Three other Circuit Courts of Appeals have addressed the validity of state laws regulating worker safety and public safety. All of the circuit courts rejected the contention that Congress intended the OSH Act to preempt state public safety and environmental protection laws. However, the courts concluded that section 18 of the OSH Act expressly preempts those state regulations whose sole purpose is to regulate occupational safety. Each circuit applied a different analysis in measuring the validity of state laws which promoted public safety as well as occupational safety.

The Third Circuit concluded that state laws whose primary purpose addressed a concern other than occupational

health and safety were not preempted by section 18 of the OSH Act. *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130, 138 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987); *see also, Hughey I, supra.*

The Second Circuit addressed this issue in *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 55 (2d Cir. 1988). The Second Circuit criticized the Third Circuit's preemption test on the ground that: " 'primary' is an ambiguous word and to adopt its use leads down an unmarked avenue of inquiry into legislative motive, which is 'often an unsatisfactory venture.' " *Id.* at 57, *citing, Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Therefore, the Second Circuit developed a different test upholding local regulations for which there is a "legitimate and substantial purpose apart from protecting asbestos workers." *Environmental Encapsulating*, 855 F.2d at 57.

The First Circuit addressed the issue of section 18 preemption in *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990). The First Circuit noted that the Third and the Second Circuit tests require inquiry into legislative intent. *Id.* at 279. Rather than attempting to devine the legislative purposes underlying the state law, the First Circuit focused its attention on the "effect" of the state law. *Id.* at 280. The First Circuit upheld the validity of almost all the more stringent Massachusetts requirements which had the effect of promoting public safety even though they accomplished this purpose by regulating workers. *Id.*

The Seventh Circuit also agreed that OSHA is not empowered to promulgate environmental regulations that do not bear on worker health and safety, and that OSHA

would exceed its statutory delegation if it attempted to displace state environmental regulation of hazardous waste sites. (Pet. App. 18 note 7). However, the Seventh Circuit rejected the approaches taken by the other circuits and held that section 18 preempts any state law or regulation that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety." (Pet. App. 19).

The consequences of the Seventh Circuit's decision spell disaster for a wide variety of state and local public health and safety legislation. For example, OSHA has promulgated an extensive safety standard relating to the general installation of electrical systems. 29 C.F.R. §1910.301 (1991). Provisions of this OSHA standard are duplicated in the National Electrical Code which is adopted, largely verbatim, by local building code authorities. The decision of the Seventh Circuit would in effect invalidate all these local electrical codes. Furthermore, pursuant to the court's reasoning, all state and local governmental laws licensing electricians would also be preempted since OSHA has issued a standard that prescribes the manner in which electrical equipment must be installed in the workplace.

Similarly, OSHA has issued a proposed rule governing occupational exposure to bloodborne pathogens, such as HIV or Hepatitis B virus. 54 Fed. Reg. 23042 (May 30, 1989) (to be codified at 29 C.F.R. §1910). The proposed OSHA bloodborne pathogen standard will require that all "employees routinely exposed to human blood" receive extensive training in the safe handling of infected and potentially infected materials. (*Id.* at 23073). Doctors, dentists, nurses, midwives, medical technicians, and embalmers are often emloyees routinely exposed to human blood. Under the Seventh Circuit's preemption test, parts

of the state acts that license these professions and occupations would be preempted by the proposed OSHA bloodborne pathogen standard. Unquestionably, this is not the result intended by Congress.

Even if this Court concludes that section 18 preempts states from enacting occupational safety legislation, this Court need not strike the Illinois licensing acts. Rather, this Court should adopt the dual purpose analysis of the Second Circuit to uphold the validity of the acts because they further the legitimate and substantial state goals of protecting the public and the environment, and do not conflict with OSHA requirements. The district court applied the Second Circuit's dual purpose analysis and upheld the validity of the Illinois licensing acts. (Pet. App. 54). The Illinois licensing acts would also be valid under the more objective "effects" test endorsed by the First Circuit. In affirming the validity of the Illinois licensing acts under either the Second or the First Circuit's analysis, and rejecting that of the Seventh Circuit, this Court would avoid transforming Congress' shield of worker protections into a sword striking down state public safety and environmental protection laws.

The purpose and scope of the OSH Act and the hazardous waste standard are limited to protecting employees. State laws that protect the environment and public safety while also promoting worker safety do not frustrate OSHA's purpose. The Seventh Circuit stipped Illinois of its traditional power of regulating for the protection of its citizens and the environment. This result is entirely inconsistent with the spirit of cooperative federalism that has long been reflected in the decisions of this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests this Honorable Court to reverse the decision of the Seventh Circuit Court of Appeals which declared the Illinois licensing acts preempted by section 18(b) of the OSH Act.

Respectfully submitted,

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APPENDIX TO PETITIONER'S BRIEF

THE OCCUPATIONAL SAFETY AND HEALTH ACT (The OSH Act)

29 U.S.C. § 651

§ 651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct ex-

perimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

29 U.S.C. § 652

§ 652. Definitions

For the purposes of this chapter—

* * *

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe and healthful employment and places of employment.

29 U.S.C. § 653

§ 653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

* * *

(4) Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 654

§ 654. Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

29 U.S.C. § 655

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employee. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of

the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be

based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

* * *

29 U.S.C. § 655 note (Codification of Section 126 of the Superfund Amendments and Reauthorization Act of 1986)

WORKER PROTECTION STANDARDS

"(a) PROMULGATION.—Within one year after the date of the enactment of this section [Oct. 17, 1986], the Secretary of Labor shall, pursuant to section 6 of the Occupational Safety and Health Act of 1970 [29 U.S.C. 655], promulgate standards for the health and safety protection of employees engaged in hazardous waste operations.

"(b) PROPOSED STANDARDS.—The Secretary of Labor shall issue proposed regulations on such standards which shall include, but need not be limited to, the following worker protection provisions:

"(1) SITE ANALYSIS.—Requirements for a formal hazard analysis of the site and development of a site specific plan for worker protection.

"(2) TRAINING.—Requirements for contractors to provide initial and routine training of workers before such workers are permitted to engage in hazardous waste operations which would expose them to toxic substances.

"(3) MEDICAL SURVEILLANCE.—A program of regular medical examination, monitoring, and surveillance

of workers engaged in hazardous waste operations which would expose them to toxic substances.

"(4) PROTECTIVE EQUIPMENT.—Requirements for appropriate personal protective equipment, clothing, and respirators for work in hazardous waste operations.

"(5) ENGINEERING CONTROLS.—Requirements for engineering controls concerning the use of equipment and exposure of workers engaged in hazardous waste operations.

"(6) MAXIMUM EXPOSURE LIMITS.—Requirements for maximum exposure limitations for workers engaged in hazardous waste operations, including necessary monitoring and assessment procedures.

"(7) INFORMATIONAL PROGRAM.—A program to inform workers engaged in hazardous waste operations of the nature and degree of toxic exposure likely as a result of such hazardous waste operations.

"(8) HANDLING.—Requirements for the handling, transporting, labeling, and disposing of hazardous wastes.

"(9) NEW TECHNOLOGY PROGRAM.—A program for the introduction of new equipment or technologies that will maintain worker protections.

"(10) DECONTAMINATION PROCEDURES.—Procedures for decontamination.

"(11) EMERGENCY RESPONSE.—Requirements for emergency response and protection of workers engaged in hazardous waste operations.

"(c) FINAL REGULATIONS.—Final regulations under subsection (a) shall take effect one year after the date they are promulgated. In promulgating final regulations on standards under subsection (a), the Secretary of Labor shall include each of the provisions listed in paragraphs (1) through (11) of subsection (b) unless the Secretary determines that the evidence in the public record con-

sidered as a whole does not support inclusion of any such provision.

"(d) SPECIFIC TRAINING STANDARDS.—

"(1) OFFSITE INSTRUCTION; FIELD EXPERIENCE.—Standards promulgated under subsection (a) shall include training standards requiring that general site workers (such as equipment operators, general laborers, and other supervised personnel) engaged in hazardous substance removal or other activities which expose or potentially expose such workers to hazardous substances receive a minimum of 40 hours of initial instruction off the site, and a minimum of three days of actual field experience under the direct supervision of a trained, experienced supervisor, at the time of assignment. The requirements of the preceding sentence shall not apply to any general site worker who has received the equivalent of such training. Workers who may be exposed to unique or special hazards shall be provided additional training.

"(2) TRAINING OF SUPERVISORS.—Standards promulgated under subsection (a) shall include training standards requiring that onsite managers and supervisors directly responsible for the hazardous waste operations (such as foremen) receive the same training as general site workers set forth in paragraph (1) of this subsection and at least eight additional hours of specialized training on managing hazardous waste operations. The requirements of the preceding sentence shall not apply to any person who has received the equivalent of such training.

"(3) CERTIFICATION; ENFORCEMENT.—Such training standards shall contain provisions for certifying that general site workers, onsite managers, and supervisors have received the specified training and shall prohibit any individual who has not received the training from engaging in hazardous waste operations covered by the standard. The certification procedures shall be no less comprehensive than those adopted

by the Environmental Protection Agency in its Model Accreditation Plan for Asbestos Abatement Training as required under the Asbestos Hazard Emergency Response Act of 1986 [Pub. L. 99-519, see Short Title of 1986 Amendment note, set out under section 2601 of Title 15, Commerce and Trade].

"(4) TRAINING OF EMERGENCY RESPONSE PERSONNEL.—Such training standards shall set forth requirements for the training of workers who are responsible for responding to hazardous emergency situations who may be exposed to toxic substances in carrying out their responsibilities.

"(e) INTERIM REGULATIONS.—The Secretary of Labor shall issue interim final regulations under this section within 60 days after the enactment of this section [Oct. 17, 1986] which shall provide no less protection under this section for workers employed by contractors and emergency response workers than the protections contained in the Environmental Protection Agency Manual (1981) 'Health and Safety Requirements for Employees Engaged in Field Activities' and existing standards under the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.] found in subpart C of part 1926 of title 29 of the Code of Federal Regulations. Such interim final regulations shall take effect upon issuance and shall apply until final regulations become effective under subsection (c).

"(f) COVERAGE OF CERTAIN STATE AND LOCAL EMPLOYEES.—Not later than 90 days after the promulgation of final regulations under subsection (a), the Administrator shall promulgate standards identical to those promulgated by the Secretary of Labor under subsection (a). Standards promulgated under this subsection shall apply to employees of State and local governments in each State which does not have in effect an approved State plan under section 18 of the Occupational Safety and Health Act of 1970 [29 U.S.C. 667] providing for standards for the health and safety protection of employees engaged in hazardous waste operations."

29 U.S.C. § 667

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate

to the same issues, and which standards, when applicable to products which are distribued or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

* * *

(h) Temporary enforcement of State standards

The Secretary may enter into an agreement with a State under which the State will be permitted to continue

to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

29 U.S.C. § 672

§ 672. Grants to States

(a) Designation of State agency to assist State in identifying State needs and responsibilities and in developing State plans

The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years, to make grants to the States which have designated a State agency under section 667 of this title to assist them—

(1) in identifying their needs and responsibilities in the area of occupational safety and health,

(2) in developing State plans under section 667 of this title, or

(3) in developing plans for—

(A) establishing systems for the collection of information concerning the nature and frequency of occupational injuries and diseases;

(B) increasing the expertise and enforcement capabilities of their personnel engaged in occupational safety and health programs; or

(C) otherwise improving the administration and enforcement of State occupational safety and health laws, including standards thereunder, consistent with the objectives of this chapter.

(b) Experimental and demonstration projects

The Secretary is authorized, during the fiscal year ending June 30, 1971, and the two succeeding fiscal years,

to make grants to the States for experimental and demonstration projects consistent with the objectives set forth in subsection (a) of this section.

(c) Designation by Governor of appropriate State agency for receipt of grant

The Governor of the State shall designate the appropriate State agency for receipt of any grant made by the Secretary under this section.

(d) Submission of application

Any State ageny designated by the Governor of the State desiring a grant under this section shall submit an application therefor to the Secretary.

(e) Approval or rejection of application

The Secretary shall review the application, and shall, after consultation with the Secretary of Health and Human Services, approve or reject such application.

(f) Federal share

The Federal share for each State grant under subsection (a) or (b) of this section may not exceed 90 per centum of the total cost of the application. In the event the Federal share for all States under either such subsection is not the same, the differences among the States shall be established on the basis of objective criteria.

(g) Administration and enforcement of programs contained in approved State plans; Federal share

The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 667 of this title. The Federal share for each State

grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) of this section shall be applicable in determining the Federal share under this subsection.

(h) Report to President and Congress

Prior to June 30, 1973, the Secretary shall, after consultation with the Secretary of Health and Human Services, transmit a report to the President and to the Congress, describing the experience under the grant programs authorized by this section and making any recommendations he may deem appropriate.